IN THE

Supreme Court of the United States

October Term, 1979

No. 79-804

ROBERT ANTHONY REED, et al.,

Respondents,

v.

JAMES A. RHODES, et al.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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The respondents, Robert Anthony Reed, et al., plaintiffs below, oppose the petition for certiorari of the petitioners, The Cleveland Board of Education, its individual members and Superintendent of Schools, defendants below.

Questions Presented

1. Did the District Court in finding, and the Court of Appeals in affirming, that the Cleveland Public Schools were intentionally and purposefully segregated by official action and inaction of the defendant school authorities (petitioners herein) apply the correct legal standards as enunciated by this Court in *Brown, Keyes, Swann, Dayton I* and *II* and *Columbus?*

2. Was the remedy ordered by the District Court and affirmed by a unanimous Court of Appeals, commensurate with the Constitutional violations found?

Statement of the Case

Respondents will rely on the Appendix to the petition for certiorari submitted by the petitioners herein. References to the Appendix will be cited as "App.". The petitioners' Statement of the Case, is, however, both incomplete and inaccurate and, thus, requires clarification.

Petitioners seek review of (1) extensive findings made by the District Court of intentional, systemwide segregation having a current impact within the Cleveland Public Schools; and (2) the remedy ordered to address and eliminate such segregation. The violations found, and remedial plan ordered, by the District Court, which were based upon a thorough examination of a massive record, were independently reviewed by the Court of Appeals which affirmed, in all respects, the orders against the petitioners.[1]

This protracted litigation began on December 13, 1973, when respondents filed their complaint against school officials of the Cleveland City School District and the State of Ohio, alleging that the defendants had purposefully and intentionally, created, maintained and were operating a racially dual system of public schools in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The action was filed and certified as a class action on behalf of all black students enrolled and/or eligible to attend the Cleveland Public Schools, and their parents or legal guardians.

[1] The Court of Appeals remanded the findings against certain State of Ohio educational authorities. (App. 5-6) Therefore, matters pertaining to the State defendants were neither raised by the petitioners, nor are they before the Court at this time.

After an extensive trial lasting over four months and consuming 31 actual trial days, during which over 400 exhibits were introduced, 31 witnesses testified and over 4000 pages of transcript produced, the District Court, on August 31, 1976, in its memorandum opinion and order reached the inescapable conclusion that the segregation of students and staff within the system was the proximate result of more than 200 separate instances of intentional segregatory actions and inactions of the petitioners. (App. 47-241). The Court concluded that the petitioners had

> . . . violated the plaintiffs' 14th Amendment right to equal protection under the laws by intentionally creating and maintaining a segregated school system. (App. 240)

Upon remand from the Court of Appeals,[2] the District Court carefully reviewed and reexamined each of the original factual findings, the relevant case law, including *Dayton I*, and other controlling decisions of this Court. (App. 244) On February 6, 1978, the Court issued its remand opinion in which it, once again, concluded that:

> . . . plaintiffs' evidence establishes numerous constitutional violations on the part of defendants; that defendants intended to and did in fact discriminate against the plaintiffs by numerous acts and omissions, the purpose and effect of which were to foster and maintain a segregated dual school system; and that these numerous constitutional violations had system-

[2] After briefs were submitted to and oral arguments heard by the Court of Appeals, this Court issued its decision in *Dayton Board of Education* v. *Brinkman, (Dayton I)*, 433 U.S. 406 (1977). Without reversing, vacating or modifying the District Court's liability order, the Court of Appeals remanded the case to the District Court for further consideration in light of *Dayton I*. Upon remand, the District Court invited all parties to submit additional evidence, however, no party chose to do so.

wide impact entitling plaintiffs to a systemwide remedy. (App. 244)

Two days later, on February 8, 1978, the District Court issued its remedial opinion and order. Commensurate with the systemwide violation found, the remedial order provided for the systemwide desegregation of the Cleveland Public Schools. In addition, various educational and remedial components were included, as necessary "to overcome the effects of the dual system and *de jure* segregation, and to assure an effective transition to a racially neutral non-discriminatory, unitary system." (App. 335)

Subsequent to the filing of the petitioners' appeal from the remand and remedial orders, but before the appellate court had issued its opinions thereon, this Court decided *Columbus Board of Education* v. *Penick*, —— U.S. —— 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979) and *Dayton Board of Education* v. *Brinkman, Dayton II*, —— U.S. ——, 99 St.Ct. 2941, 61 L.Ed.2d 720 (1979), and affirmed orders of the lower courts which had held that local school officials were responsible for intentionally segregating the public schools in two other Ohio cities, Dayton and Columbus.

Thereafter, the Sixth Circuit Court of Appeals issued its opinion and order in the Cleveland case. In affirming the liability, remand and remedial orders of the District Court, the Appellate Court independently reviewed the findings of the District Court and the record below. (App. 1) The Court of Appeals found that the District Court had recognized the appropriate and controlling legal burdens of the parties and had properly applied the law to the facts found. (App. 2-3) The Appellate Court further found that the liability, remand and remedial orders of the District Court were entirely consistent with this Court's

most recent decisions in *Dayton II* and *Columbus* (App. 3), as well as this Court's prior holdings in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), *Green* v. *County School Board*, 391 U.S. 430 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973) and *Dayton I, supra.*

ARGUMENT

I.

The Correct Legal Standards Were Applied by the Lower Courts.

A. *Legal Analyses of the Lower Courts*

Both of the Courts below correctly articulated and applied the controlling legal standards as enunciated by this Court commencing with *Brown*, and reaffirmed most recently in *Columbus* and *Dayton II*.

In its decision, the Court of Appeals noted that the District Court recognized:

> . . . that statistical proof of segregated schools, absent *intentional* segregation on the part of school authorities, did not constitute violation of the Fourteenth Amendment's prohibition against equal protection of the law. (App. 2) (emphasis added)

After carefully scrutinizing the decisions of this Court which establish the standard of proof in school desegregation cases, the Court of Appeals stated that the question before it was "whether the undisputed segregation established in this record was intentionally created by actions of defendants or their predecessors." (App. 15)

The Court of Appeals independently analyzed various practices and policies of the petitioners and concluded that such actions were "intentionally segregative and substantial in their impact upon the entire school system." (App. 41) The Court further found, as had the District Court, that numerous administrative devices had "been employed [by petitioners] intentionally for segregative purposes." (App. 41), and that "in view of the number of such usages and the large number of students affected thereby [the employment of such devices] cannot properly be termed isolated, in our judgment, but must likewise be held in sum total to have had systemwide impact." (App. 41) The Court concluded that "with such massive evidence of intentional discrimination as we have found . . . [the segregation of students in the system] was not 'adventitious' or due to 'neutral' causes but was, on the contrary, intentional." (App. 41-42)

With respect to the remedial plan ordered by the District Court, the Court of Appeals, directly applying the language and principles of this Court as set forth in *Keyes, Dayton II* and *Columbus,* affirmed the remedy as being fully warranted to address the numerous Constitutional violations found. (App. 42-46)

The District Court also applied the correct legal standards. It too clearly acknowledged that the "critical issue in school desegregation cases is intent". (App. 50) In its remand opinion, the Court fully explained the bases of its legal analysis:

> Proof of segregative purpose or intent is essential in a *de jure* school desegregation case. Although proof of segregative effect is clearly relevant in ascertaining segregative purpose, proof of segregative effects, without more, does not usually constitute proof of

segregative purpose. However, where an unmistakable pattern of segregative effects exists and cannot be explained on other than a racial basis, segregative purpose may be inferred. The Court has proceeded on the theory that if school officials engage in actions the natural, probable and foreseeable consequences of which are segregative and if these actions are not applications of racially neutral policies, then the inference may be drawn that such actions were performed with the purpose or intent to segregate. Moreover, where a purposeful pattern of segregation has developed over time, *de jure* segregation exists despite the fact that individual official actions, when considered alone, may not have been purposefully segregative. (App. 251)

After careful examination, and reexamination, on remand, of the record, the Court "found over 200 segregative acts, the bulk of which were proved to be intentional by independent evidence and not through the use of a presumption arising from segregative effects alone." (App. 249) The Court further found that the petitioners' "actions impacted upon every school in the system by racially identifying to all residents, black and white, which schools were theirs." (App. 250)

Based upon its findings of systemwide *de jure* segregation, the District Court concluded that a "comprehensive plan of actual desegregation which eliminates the systematic pattern of schools substantially disproportionate in the racial composition to the maximum extent feasible" was mandated. (App. 281-282)

The lower courts thus correctly required, and, as will be discussed below, found substantial evidence of intentional and purposeful conduct on the part of the petitioners

in the creation and maintenance of public school segregation.

B. *Numerous Intentionally and Purposefully Segregative Acts and Omissions Were Found*

In an unprecedented and unparalleled number of instances, by employing, over a thirty-five year period, every imaginable technique, the Cleveland school officials were found to have acted and failed to act to intentionally create and maintain segregation of students, faculty and staff within the district's public schools.

Any analysis of the record evidence upon which the District Court based its findings must necessarily begin with a review of the severe segregation of students which existed at the time of the liability trial. In 1973, the District operated 170 regular elementary, junior and senior high schools. (App. 250) Of these, 67 had student population which were 90-100% white; and 83 had student populations which were 90-100% black, at a time when the black student population of the system was 57%. (App. 250). Thus, of 170 schools, 150, or 88%, were 90-100% one-race schools, enrolling 88.21% of the entire student population of the system. (App. 47) Among black students, nearly 92% were enrolled in schools 90-100% black. (App. 48, 250)[3]

As the Court of Appeals noted, "such a severely segregated racial distribution in itself strongly suggests school

[3] The District Court further found, that while the percentage of all Cleveland students attending one-race schools had increased only moderately since 1950 (i.e., in 1940, 88.37% of all students attended schools 90-100% white or black; 1950: 74.09%; 1960: 79.09%; 1970: 86.07%; and 1975: 88.21%), the proportion of black students attending such one-race schools had increased dramatically during the same period (in 1940, 51.03% of all black students attended schools which were 90-100% black; 1950: 58.08%; 1960: 76.03%; 1970: 90.0% and 1975: 91.75%). (App. 47-48)

board policy rather than chance." (App. 16)[4] With this statistical backdrop, each of the lower courts proceeded to analyze and find numerous school board actions which intentionally created and maintained racial separation within the schools. The actions found by the District Court, undisturbed by the Court of Appeals and indistinguishable from other segregatory acts relied upon and found by numerous courts in other similar litigation, included:

1. Segregation of Faculty and Administrators

The District Court found that during the period from 1969-1974, i.e., that period immediately preceding the liability trial, 84% of all black elementary and junior high school teachers and 90% of all black senior high school teachers were assigned to schools which were 90-100% black in student enrollments. (App. 278)[5] The Court of Appeals independently reviewed the record and rightfully found that it conclusively established that teacher assignments on the basis of race was a systemwide policy re-

[4] Based upon its own independent review of the record, the Court of Appeals also found that in 1975, "out of a total of 175 schools, 71 schools were over 99% black, while 48 other schools either had no black students at all or fewer than 1% black students." (App. 16)

[5] Thus, contrary to the petitioners' assertions that the faculty statistics relied on by the District Court were "obsolete", such data presented an accurate picture of faculty assignments as this case was being set for liability trial. The District Court, moreover, considered and rejected as not probative, evidence of post-litigation faculty assignments:

> Such additional figures would reflect some progress made in the area of faculty integration. Such progress is both necessary and highly commendable. But board actions taken after the initiation of this lawsuit are far less probative than policies followed for a significantly longer period prior to the institution of legal proceedings. (App. 219)

It can be safely said that the termination of the segregative assignment of faculty by petitioners was in direct response to this litigation.

ligiously followed by the petitioners "up to the filing of the complaint and beyond." (App. 16)

Thus, both Courts below found, and the petitioners freely admit (Petition 5-6), a pattern and practice of assigning faculty on the basis of race. The petitioners' claim, however that, a benevolent purpose was behind such segregative conduct, and therefore argue that they should be immunized from any finding of Constitutional wrongdoing. Assuming *arguendo* that such a defense was legally valid, the District Court below found, and the record amply supports that the petitioners' protestation of good faith was not credible. (App. 254).[6] More basic, however, is the fact that a party may not intentionally engage in unconstitutional conduct, notwithstanding a purported benevolent purpose.[7] The purposeful and intentional assignment of faculty on the basis of race engaged in by the petitioners for over thirty-five years was manifestly violative of the

[6] In fact, the Court found the testimony of Russell Davis, who served in the Cleveland Public Schools in various capacities for 37 years, to be highly credible on the issue of the petitioners' purposeful assignment of teachers on the basis of race as a means of perpetuating the dual structure of the system:

> Well, I don't know whether you want to call it policy or custom or understanding or whatever it is, but if you were black you went to a school with a predominantly black enrollment. Tr. at 1585 (App. 18, 218)

[7] In *Clemmons* v. *Bd. of Ed. of Hillsboro,* 228 F.2d 853, 859 (6th Cir., 1956), then Circuit Judge Potter Stewart, speaking for the Sixth Circuit Court of Appeals, strictly applied *Brown* to post-*Brown* segregative school board action:

> The Board's action was . . . not only entirely unsupported by any color of state law, but in knowing violation of the Constitution of the United States. The Board's subjective purpose was no doubt, and understandably to reflect the 'spirit of the community' and to avoid 'racial problems', as testified by the Superintendent of Schools. But the Law of Ohio and the Constitution of the United States simply left no room for the Board's action, *whatever motives the Board may have had* . . . (emphasis added)

Constitution, and necessarily had systemwide impact. *Keyes,* 413 U.S. at 199-200, 202 (1973); *Swann,* 402 U.S. at 18 (1971); *Columbus,* 61 L.Ed.2d 666, 678, 679 (1979); *Dayton II,* 61 L.Ed.2d 720, 732-733 (1979)

2. School Construction and Additions

The District Court found that in 26 instances, either by the site selected for a particular school, or the subsequent decisions made regarding the attendance zone of a school, the petitioners constructed new and replacement schools which they "knew would be segregated and intended such results." (App. 268-269)[8] Moreover, in 15 other instances, the petitioners' construction of additions to existing schools were found to have been segregatively intended. (App. 270) The Court further found that the petitioners, in other instances, built schools exclusively to serve public housing facilities, which petitioners knew to be illegally racially segregated. (App. 279). As a result, the Court found that the petitioners knew and intended that these schools would be racially segregated. (App. 279). *Swann,* 402 U.S. 1, 20-21 (1971); *Keyes,* 413 U.S. 189, 201-203, 211-213 (1973); *Columbus,* 61 L.Ed.2d 666, 678, 679 (1979); *Dayton II,* 61 L.Ed.2d 720, 732-733 (1979).

[8] Petitioners contend that in pursuing a policy of constructing segregated schools they were merely following "Ohio's neighborhood school law". The State of Ohio has no law which requires that children attend a school in their neighborhood. Nor has any Court ordered these, or any other school officials in Ohio, to build schools in such a way that all children attend school in their neighborhood. Assuming *arguendo,* that such a law existed, the petitioners felt no duty or responsibility to obey such an imaginary law when they granted students special transfers to allow them to transfer from their "neighborhood" schools, or when the petitioners established optional attendance zones, which allowed students to "opt out" of their "neighborhood" schools. Numerous other "exceptions" to the "neighborhood school policy" were similarly allowed by petitioners, all of which contributed significantly to the creation of racially identifiable schools. (App. 211-216; 225-230)

Also see, *Columbus,* 61 L.Ed.2d 666, 679 n.8 (1979).

The Court of Appeals acting independently found the Cleveland school officials' construction and additions policies to have contributed substantially to the systemwide segregation within the District. (App. 31)

3. Relay Classes and Intact (Segregated) Busing

In seven instances the District Court found that the petitioners forced black children to attend half-day sessions because the schools to which they were assigned were overcrowded. (App. 275) In each such instance, the Court further found that available classroom space in nearby white schools went unused as the petitioners pursued their racist and racially segregative student assignment policies. (App. 275-276) Obviously, such blatant disregard for the rights of minority students fell short of even *Plessy* v. *Ferguson*, 163 U.S. 369 (1896) standards, and was a clear indication of the petitioners' segregative intent and design. (App. 208-216, 275-276)

Moreover, even after community demands forced the petitioners to abandon their use of relay classes, the petitioners resorted to the humiliating and totally degrading practice of transporting black students "intact" from their homes schools to nearby white schools, where the black students were kept separate from any contact with their white classmates. (App. 32, 210). The District Court found 18 separate instances of intact busing, each instance involving two schools, one white and one black. (App. 208-211, 271-272) Both the District Court and the Court of Appeals considered evidence of intact busing to be some of the most damaging proof in the record of the petitioners' purposeful segregative conduct. (App. 31-37, 208-216, 275-276)[9]

[9] The petitioners, of course, attempt to minimize the significance of such patently racist conduct by asserting that it was "short-lived." The shameful and undisputed fact remains, however, that even after black children were "diffused" (the petitioners' term) into the white receiving classes they were "forced to sit apart, eat apart, recreate apart and use toilet facilities at separate times . . . and that in some instances (they) were even publicly ridiculed in their academic work." (App. 271) The Court of Appeals quoted, at length, from the trial testimony of one such child, now an adult. (App. 34-36) In commenting on this testimony, the Court of Appeals specifically found that for this and other students subjected to this inexcusable treatment, the segregation practiced by the petitioners had a continuing impact. (App. 37)

Significantly, the discontinuance of the practice of intact busing occurred when three new schools, each of which opened 97% or more black, were constructed by the petitioners specifically for the transported students. Thus, as the District Court found, an opportunity to effect some small measure of desegregation within the system was lost, and the "transported students (were) restored to their racially isolated condition of containment." (App. 37)

4. Boundary Changes, Optional Zones, Special Transfers, Use of Private Rental Facilities, and the Use of Portable Classrooms.

The District Court found that in an overwhelming number of instances, the petitioners used these administrative devices, not to advance some neutral educational purpose, but to intentionally create and maintain segregation of students within the schools.[10] In analyzing the evidence presented on the use of these devices, the Court carefully considered desegregative or racially neutral alternatives available to the petitioners. (App. 62-208) In each such instance, the Court found that the petitioners deliberately chose to ignore such alternatives and instead chose to pursue a course of purposeful segregation. (*Ibid.*)

[10] The Court found 53 segregative boundary changes (App. 261-264); 36 segregative optional zones (App. 264-266); that in ten instances, portable classrooms were placed at schools so as to create or intensify existing racial segregation (App. 273-276); and in six instances, assigned students to classes conducted in rented, private facilities with the predictable and intended result of creating or intensifying segregation. (App. 275)

Additionally, and contrary to the petitioners' contentions, that the Court ignored their rebuttal evidence,[11] the Court carefully scrutinized each defense raised by petitioners:

> Where there was factual support for the claim that such decisions had compelling educational bases, or where legitimate safety concerns were being met in a plausible and nonracial manner, the allegations of the plaintiffs were set aside. However, there remain more than 200 enumerated actions cited in the liability opinion for which the explanations of the defendants were not credible or were not legally permissible. In these instances, the Court finds that the defendants acted (1) *not only* with awareness of the natural, probable, and foreseeable consequences of their own acts, (2) *but also* with the purpose and intent to maintain racial segregation. (App. 255) (emphasis in original)

The Court of Appeals rightfully found, based upon an independent review of the record that the findings of the District Court concerning the segregative use of these administrative devices, not to be clearly erroneous:

[11] The "evidence" referred to by petitioners (Petition, 9), consisted of written statements prepared by Board of Education personnel at the time of trial, which purported to be explanations for the reasons behind each of the actions and inactions plaintiffs were contending to be evidence of intentional segregatory conduct. While plaintiffs' evidence consisted of documents which were contemporaneous with the challenged Board action, the petitioners' rebuttal "evidence" was nothing more than after-the-fact, self-serving, statements, in many instances prepared by Board personnel who were not even employed by the District at the time of the occurrence of the particular action in question. In any event, and notwithstanding its totally self-serving character, the Courts below carefully considered the petitioners' proffered explanations, and rejected those which were not credible. (App. 253-257)

> The employment of optional zones, boundary changes, special transfers, and the use of private rental and portable classrooms in this case in view of the number of such usages and the large number of students affected thereby cannot properly be termed isolated, in our judgment, but must likewise be held in sum total to have had systemwide impact. (App. 39, 41)

II.

The Remedy Ordered Was Commensurate With the Constitutional Violations Found.

In *Columbus* and *Dayton II,* this Court reaffirmed the principle first enunciated in *Keyes*:

> Proof of purposeful and effective maintenance of separate black schools in a substantial part of the system itself is prima facie proof of a dual system and supports a finding to this effect absent contrary proof by the Board . . . *Columbus,* 61 L. Ed. 2d 666, 680-681 (1979), citing, *Keyes, supra,* at 203.

While it would thus have been permissible for the District Court to infer the existence of systemwide segregation based upon the evidence of intentional segregation affecting a substantial part of the district,[12] the findings of the District Court clearly reveal that the Court did not resort to or rely upon such inference drawing, but rather,

[12] The District Court found that:

> In Cleveland, there is proof of over 200 separate instances of intentionally segregative behavior occurring in every part of the district at all grade levels, not only in the Central area, but in the Beehive, Southeast, Hough-Dunham, Glenville, Northeast and Westside areas of Cleveland as well, establishing a long-standing pattern of purposeful segregation. (App. 247-248)

found deliberate and intentional segregative conduct on the part of the petitioners based "upon independent evidence and not through the use of a presumption arising from segregative effects alone." (App. 249)

Dayton II and *Columbus* both provide that, where purposeful segregative practices with current systemwide impact are found, a Court is warranted, and in fact, under a duty to order a systemwide remedy designed to eliminate the effects of the defendants' illegal conduct. *Columbus,* 61 L. Ed. 2d 666, 682, n.15 (1979), *Dayton II,* 61 L. Ed. 2d 720, 735-736 (1979). Specifically, this Court has held that where such findings of systemwide segregation are made, resort to the *Dayton I* test and identification of the "incremental segregative effect" of the violations is unnecessary since the entire system has been tainted and impacted by the unconstitutional activity, and thus, the remedy must address the segregation existing *systemwide. Columbus,* 61 L. Ed. 2d 666, 677, n. 7, 681-683 (1979).

Nevertheless, and despite the clear, unequivocal language in this Court's *Dayton II* and *Columbus* opinions, the petitioners herein continue to argue that, notwithstanding a finding of systemwide segregation, the remedy ordered exceeded the violation.[13] Specifically, petitioners argue that, since Cleveland is a residentially segregated City, the

[13] The remedy ordered by the District Court in *Columbus* was challenged by the defendants therein on similar grounds. In response to the Columbus defendants' arguments that the District Court erred in requiring that every school in the system be brought roughly within proportionate racial balance, this Court stated that it saw:

> . . . no misuse of mathematical ratios under our decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 22-25 (1971), especially in light of the Board's failure to justify the continued existence of 'some schools that are all or predominantly of one race. . .' *Columbus,* 61 L.Ed.2d 666, 674 n.3.

school authorities are not responsible for, and could not be required to remedy, all of the segregation within the school system. In light of *Dayton II* and *Columbus* this argument cannot be considered to have been made in good faith or upon any reasonable interpretation or reading of controlling legal standards.

The District Court made extensive findings concerning the relationship between public school and residential segregation. (App. 221-225, 279-280) The Court found that the petitioners "had been and were a causal factor in the residential segregation which is rampant in the City." (App. 279)[14]

The petitioners' challenge to the scope of the remedy is rendered even more unbelievable by virtue of the fact that they were afforded every opportunity to present evidence to the District Court demonstrating which, if any, areas of the school system were not impacted by their segregatory conduct and thus, should not be included in the remedy. No such evidence was forthcoming from the petitioners. (App. 243-244) Clearly, the petitioners have waived any right to now challenge the scope of the remedy.

The District Court's extensive and detailed findings of purposeful discriminatory conduct which contributed to

[14] Similarly, in *Columbus,* the school officials argued that because many of the involved schools were in areas that had become predominantly black residential areas by the time of trial the racial separation in the schools would have occurred even without the unlawful conduct of the school authorities. This Court, in rejecting the Columbus defendants' argument, noted that as:

> . . . the District found, petitioners' evidence in this respect was insufficient to counter respondents' proof . . . And the phenomenon described by petitioners seems only to confirm, not disprove, the evidence accepted by the District Court that school segregation is a contributing cause of housing segregation. *Columbus,* 61 L.Ed.2d 666, 681-682, n.13 (citations omitted)

and had current systemwide impact, are soundly based upon the controlling law and conclusively supports the District Court's systemwide remedy. See *Columbus, Dayton II*. Moreover, the District Court's liability, remand and remedy orders have been independently reviewed by the Court of Appeals which unanimously affirmed the orders in all respects against these petitioners.

CONCLUSION

Petitioners' bald assertion that this Court's decisions in *Dayton II* and *Columbus* have created doubt concerning the applicable legal standards to be applied in Northern school desegregation cases is totally unpersuasive and totally ignores this Court's clear articulation of the controlling law of school desegregation as it has evolved since *Brown*. This case presents no more than the proper judicial application of the principles of *Brown*, and its progeny, to the particular facts in the record.

Petitioners advance no credible reason why the comprehensive findings of the lower courts should be reviewed. The decisions of the District Court and Court of Appeals create no conflict among the Circuits or with any decision of this Court. Moreover, each of the issues raised by the petitioners has been addressed and settled by this Court. See Rule 19(1)(b), Rules of the Supreme Court of the United States. From their filing, however, it is clear that petitioners seek not only review but a trial *de novo* by this Court.

In *Dayton II* and *Columbus*, however, particular deference was given by this Court to the findings made by the lower courts. *Columbus*, 61 L.Ed.2d 666, 676 n.6, 681-682, n. 13, 682, n.15, 683 (Burger, C.J., concurring), 684-685 (Stewart, J., concurring); *Dayton II*, 61 L.Ed.2d 720, 731-732, n.8. The District Court, which has lived with and is intimately familiar with the massive record in this case, has made an ultimate finding that the petitioners have engaged in systemwide unconstitutional conduct which had continuing, systemwide impact upon the district at the time of the liability trial. The Court of Appeals has thoroughly and independently reviewed these findings and the remedy ordered and affirmed them as not clearly erroneous, F.R. Civ.P. 52, but clearly correct based upon the record evidence.[15]

For all of the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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[15] In discussing the role of the Court of Appeals, Justice White, in *Dayton II*, stated:

> . . . it [the Court of Appeals] must determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are. *Dayton II*, 61 L.Ed.2d 720, 731-732 n.8.

Certificate of Service

This is to certify that three copies of the foregoing Brief in Opposition of Respondents have been served upon each of the following counsel of record by depositing same in a United States Post Office, with first class postage prepaid, addressed to each at his post office address:

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